Supreme Court, U.S.
FILED

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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*

SHERMAN L. SHAW,

Petitioner,

v.

FRANK W. MASTERS, ET AL

Respondents,

Petition for Writ of Certiorari to the United States Supreme Court

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PETITIONER FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should a District Court and Appeals Court ignore relevant case law in ruling on the state of the law on grounds of an immunity defense and the eleventh Amendment? Hafer v Melo, 498 U.S. 1118(1991), overuled Will v Michigan Dept. of State Police, 491 U.S. 58 (1989).

2. Does not a plaintiff have a right to discovery in medical Malpractice case where he was injured during surgery when he was unconscious and under anesthesia? Pagano v Orville Hospital, 145 FRD 683 Health Care Quality Improvement Act # 42 U.S.C.A. # 11101. (HCQIA).

3. Does Concealment of the injury toll the Statute? Bailey v Glover (1875) 115 US 21 Wall 342, 22 L. Ed 636; Pavlak v. Church C,A, IDAHO 1984, 727 F 2d 1425;.. K.S.A. 60-513; Holmberg v. Armbrecht,327 U.S. 392, 396-397, 66 S Ct 582, 90 L Ed 743 (1946)

PARTIES TO THE PROCEEDING

The parties to this action in the United States Court of Appeals for the Tenth Circuit were Frank W. Masters, David W. Robinson, Gene Arthur Budig, John C. Mcfadden, members of the Univ. of Kansas medical Center; Fred Allenbrand,

POINTS RELIED UPON IN THE RECORD

1. Document-12 Masters, Robinson, Budig, and Mcfadden specifically deny that any type of foreig object or other device was ever implanted into the plaintiff's left thigh of shaw or any other object was incerted into the plaintiff(This statement by respondents was pointed out in my.... reply brief on appeal, but ignored.

2. A moving party is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact.... exists. Maughan v S.W, Servicing Inc. 758 F 2d 1381, 1387 (10th Circuit 1985). An issue of fact is material only when the dispute is over facts that might affect the outcome under the governing law.... Anderson v Liberty Lobby Inc, 447 U.S.242, 106 S Ct 2505, 2509-10 91 L Ed 2d (1986).

2. In respondemts appellee brief some...

unknown person implanted the devices since i discovered that during my... surgery the operation was extended to tampering with my brain by concealing a radio receiver allegedly... inside my brain and turned on while the above case was on appeal. as the court stated in foil, 601 2d at . 148, it would be imprudent to adopt a rule that might attempt some health care providers to fail to advice patients of mistakes that have been made and even to make efforts to suppress..... knowledge of such mistakes in the hope that the running of the statute of limitations would make a valid cause of action nonactionable ...the law should foster a fulfillment of a duty to disclose so that proper remidial measures can be taken and damages ameliorated. quoted in S.W._____ Servicing, 758 F 2d 1181.

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OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit will not be reported according to the tenth,_____, Circuit Court of Appeals. 16 F 3d 417.

Petitioner will reproduce the decision as it was issued by the Appeals Court.

*

JURISDICTION

The decision of the Tenth Circuit was entered on Feb. 7-1994. Petitioner did not file a timely Petition for rehearing which he knew would not have been granted since a timely motion to amend judgment had been entered on on 7-8/93 and denied. Appeal court's order and judgment was entered on February-7/1994

Mandate issued March 1, 1994, and the petition for writ of certiorari____ was timely filed and returned with instrutions to file the petition and Appendix together. This Court has jurisdiction over this matter pursuant to 28 U.S.C. # 1254(1).

*

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the United States Constitution provides in pertinent part: Congress shall make no " law" Abridging these liberties, which includes freedom of speech, assembly, association and freedom of press, and freedom of religion

The Constitutional right of free expression is intended to remove governmental restriant from arena of public discussion puttin decision as to what views shall be voiced largely into the hands of each of us in the belief that no other approach would comport with premise of individual dignity and choice upon which our political system rests, U.S.C.A. Const. Amend. 1., Simon & Schuster v N.Y. Crime Victims Bd. Cite as 112 S Ct 501 (1991)

Title 42 United States Code, # 1983, providrs in pertinent part:

Every person who, under color of any statute,ordinance, regulation, custom or usage, of any state subjects or... causes to be subjected, any citizen.. of the United States to the deprivations of any rights, priveleges, or... immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding.. for redress.

Section 1 of the Fourteenth Amendment to the United States Constitution provides.. in pertinent part: (N)or shall any state deprive any person of life, liberty, or property, without due orocess of law;nor deny to any person within its jurisdiction ion the equal protection of the laws."

Uhder this provision implements section 42 United States Code,# 1983 for grantin relief under the statutes and the Constitution.

The Fourth Amendment to the United States provides in pertinent part:

The rights of the people to be free in in their persons, houses, papers and effects agains unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath of information, particularly describing the place to be searched and the persons or things to be siezed.

The general principle is that the first amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. Members of City Counsel____, v Taxpayers for Vincent, 466 U.S. 789, 804 (1984) Emphasis Added.

Title 42 United States Code # 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state subjects or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Qualified immunity acts safeguard government and thereby protect public at large not to benefit its agents, Waytt v Cole, U.S. Miss. (1992)

eavesdropping devices were concealled within my body parts. one in my left thigh, back side just 4 or 5 inches... from where the knee bends, and i have discovered they had also invaded into my head, allegedly to implant a radio receiver inside my brain which was.... activated after defendant's were given summary judgment on a built in defense based upon their own selfserving statements in which the immunity defense was nothing but a sham defense. there was no injury to the upper parts of my body nor no noticeable damage to my head.

The burden of proving immunity is upon the one claiming the immunity exists.... Gomez v Toledo, 1980, 446 U.S. 635, 100 S Ct 1920 64 L Ed 2d 572.

HEALTH CARE QUALITY IMPROVEMENT ACT

The HCQIA is set forth as Chapter 117 of the Public Health and Welfare Code, Entitled "Encouraging good faith professional Review Activities." It is based , inter alia, on Congressional findings that___A nationwide medical malpractice problem can be remedied through concerted professional peer review activities aimed at__ restrict(ing) the ability of incompetent physicians to move from state to state." 42 U.S.C.A. #11101.

The bill protects innocent and often helpless cusumers from abuses by bad doctors without insulating improper anticompetive behavior from Redress.' (H.R. Rep. No. 903, 99th Cong. Reprinted in 1986 U.U. Code Cong & Admin. News 6287, 6386)

In light of Congress' efforts to prevent the bill from being used to hide Anti__ trust violations, this limited privilege

should be applicable where the plaintiff is alleging precisely that public harm., While this might encourage the filing of antitrust suits to obtain such information, Congress presumably has weight the costs and benefit of the litigation that it has enacted.

These provisions are consistant with the Supreme Court's determination that the act exempts only limited aspects of medical peer review activities from antitrust liability.

The Health care quality improvement act of 1986 simply serves to create a national repository for information about a physician's past performance. see Mantle v Vanbolden 133 FRD 497 (1991) A hospital may requiest information regarding a certain doctor as it proceeds through the hiring process.

Under the (HCQIA) plaintiff alleging Medical Malpractice on him performed

during surgery is entitled to discovery of who performed the surg ery on him in which his bodily integrity and his mental facilities including his brain is being violated. requested information__ is not available from other sources, and relevant truthful information are individ ual right of litigant as well as significant public interest; (HCQIA), HEALTH CARE QUALITY IMPROVEMENT ACT. Pagano Oroville Hospital, 145 FRD 683.

There is no federal statutory basis for medical peer review privilege or selfcritical analysis privilege at least in settings where peer review or self-analysis themselves are under attack,

In federal question cases the clear weight of authority and logic supports reference to federal law on the issue of the existence and scope of an asserted privilege. Kerr v U.S. Dist. Court for northern Dist. of California, 511 F 2d 192, 197 (9th Cir 1975), Aff'd 426 U.S. 394, 96 S Ct 2119,

48 L Ed 2d 725 (1976) . Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Oppenheimer Fund, Inc. V Sanders, 437 U.S. 340, 351, 98 S Ct 2380, 2389, 57 L Ed 2d 253___ (1978).

The party asserting an evidentiary privilege has the burden to demonstrate that the privilege applies to the information in____ question." Torney v United States, 840 F 2d 1424, 1426. (9th Cir. 1988).

The physician-patient privilege is not recognized by federal common law, statute _ or the constitution. The Supreme Court has____ flatly stated that "(t)he physician-patient evidentiary priviledge is unknown to the___ common law. (Citations.)" Whalen v Roe,429 U.S. 589, 602, n 28, 97 S Ct 869, 877 n 28, 51 L Ed 2d 64 (1977).

The Ninth Circuit, while noting "that the Hippocratic tradition of physician non-disclosure of patient secrets is ancient," In

re Grand Jury Proceedings (Doe), 801 F 2d 1164, 1169 (9th Cir. 1986). When asked to develop such a rule in deference to, and as a matter of comity with California's statutory physician-patient privilege, the Ninth Circuit declined, even though it recognized "that Congress intended that the courts have flexibility to develop rules on privileged communications on a case by case basis when it enacted Fed R. Evid 501." In re Grand Jury Proceedings, 867 F 2d at 564.

In the wiretap context or bugging context the burden is always upon the defendant to establish that his conduct was justified under the circumstances and upon him to bear the burden of showing public policy requires an exemption of that scope., Butz 438 U.S. at 506, 98 S Ct at 2920.

The trial of non-jury issues may not be used to collaterally estop on fact " Issues " triable of right to a jury_ in the same case. Printers II, Inc. v. Professional Publishing, Inc. C.A. 2d. 1986, 784 F 2d 141, 147.

On certiorari, the United States.... Supreme Court vacated the judgment of, the Court of Appeals, vacated the decision of the district court with respect to the worker's Title VII claims, and remanded the case for further proceedings in an opinion by Marshal, J., expressing the unanimous view of the Court, it was held that upon assuming for the purposes of decision that the worker had no right to a jury trial on his title VII claims and upon declining to address the question.....

whether the worker's # 1981 claims, stated a cause of action-(1) the combination, in the same action, of the district court's erroneous dismissal of the worker's legal claims under # 1981, followed by the district court rulings adverse to the worker's equitable claims under title VII, did not collaterally estop the worker from relitigating the same Title VII issues before a jury in the context of the worker's # 1981 claims,because to hold otherwise would seriously undermine the worker's Seventh Amendment right to trial by jury for (a) it was undisputed that, absent dismissal the worker would have been entitled to a jury trial ***on the # 1981 claims, (b) had the # 1981___ claims remained in the suit, the ___JURY would have been required to resolve ____ those claims before the court considererred the Title VII claims (c) the worker

was required to join his legal and equitable claims to avoid the bar of res judicata, (d) the lack of a collateral estoppel bar was consistent with the Supreme Court's approach in cases involving a wrongful denial of a right to jury trial on legal issues, and (e) the purposes served by collateral estoppel did not justify applying the doctrine in the case at hand; (2) even though the company contended that the Court of Appeals judgment ought to be affirmed on the ground that the district court would have directed a verdict against the worker on his # 1981 claims, under Rule 50(a) of the Federal Rules, even if those claims had been litigated before a jury, (a) the District Court's Rule 41(b) dismissal of the worker's Title VII discriminatory discharge claim did not necessarily mean that the district court would have granted a directed verdict

Supreme Court in Hafer v Melo,__U.S.__112 S Ct 358, 116 L Ed 2d 301 (1991), and do not require furthe discusion by this court., Munir v Scott 792 F Supp 1492 at A. page 1474. Hafer v Melo quoted.

The burden of proving the immunity is upon the one claiming the immunity exists

Rather than defining nature of eleventh amendment immunity, case law under which suits seeking prospective relief may be brought against state officials in federal court challenging constitutionality of official conduct enforcing state law renders eleventh amendment wholly___ inapplicable to certain class of suits___ deamed to be against officials and not___ states or their agencies, which retain their immunity against all suits in federal court. U.S.C.A. Const Amend 11. Pueeto Rico Aqueduck and Sewer Authority v Metcalf & Eddy, Inc 113 S Ct Reporter 684___ (1993).

*

STATEMENT OF THE CASE

The Tenth Circuit Court of Appeals has closed tht doors of the court on me which would prevent me from obtain- any redress for an injury that cannot be justified in law, done without pro- bable cause except for purposes ...of entrapment. as to Mr Gene Budig i have discovered that he possessed a dual... role at the relevant time which has a lot to do with how the injury was ac- complished which means that there could be no immunity for such conduct by...an executive officer in such dual positions at the relevant time. by closing the way to the truth in this injury, has proved that the purpose of this conduct was to allow the intended acts of entrapment to have a full run unhindered in which the injury continues

REASON FOR GRANTING THE WRIR OF REVIEW

The tenth Circuit has decided a case in conflict with the decisions of... this court and other circuits on the same... matter in more than one issue in this case. In the courts' decision i an .... listed as a defendant. I am not and.... have never been a defendant.

The Tenth Circuit has effectively ..... closed the doors of the courts on me and in so doing converted this conduct into a permanent injury without any or no no.... justification or redress.

CONCLUSION

By inappropiately applying the wrong.... standard and excepting an immunity defense which is solely within possession of those with much to hide does not establish right to judgment as a matter of law. review by this court is necessary to restore these... rights. Petitioner respectfully urges this

Court to grant this petition for Writ of certiorari.

DATED: June 14, 1994

Respectfully Submitted.

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APENDIX-A

A-1

NOT PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHERMAN L. SHAW, Plaintiff-Appellant, v FRANK W. MASTERS, Professor Plastic Surgery et al Defendants-Appellees	Case No 93-3289 D,C, NO. 92-2519-GTV

Appeal from United States District Court of Kansas
G.T. Van Bebber, District Judge, Presiding

Submitted October 14, 1993
Clerk's Stamp
October 15, 1993...

No argument permitted

Filed Feburary 7, 1993

Before; SEYMOUR, Ghief Judge, McKAY, and BALDOCK, Circuit Judges
opinion by Judge SEYMOUR

SUMMARY

Civil Litigation and Procedure/Jurisdiction

The court of appeals affirme a judgment of the district court. the court held there was no abuse of discretion in the case even though discovery had been suspended pending the determination of an absolute immunity defense which was never established by the defendants, where only affirmative defenses were presented for the purpose of hindering and preventing discovery of relevant truthful information. The District Court granted summary judgment on an incomplete record in which had not been allowed to proceed. This case can be ruled upon without this court disturbing any relevant case law because it has been followed by other courts following the Supreme Court's direction on the state of the law on the same subject.

The District Court dismissed this case relying upon a case in state court which was overruled by the Supreme Court's later ruling in 1991. Hafer v Melo 498 U.S 1118, 1991 overruled Will v Michigan Department of State Police, 491 U.S. 58 (1989). will was a case in state court and do not apply to this case nor is the eleventh amendment involved.

In the brief filed by counsel he used or cited both Hafer v Melo and also Will v Michigan, which is a contridiction being inopposite to each other.

Since the appeals Court used the same standard as the district court and having already called the above case Hafer v Melo to the attention of the district court in doc 33 on the state of the law and in also the appeals court in my appeals brief and it not being considered, my only course is to seek a writ of certiorari.

No relevant discovery has taken place and according to document 24 could not go forward until defenses of immunity should preliminarily determined and the discovery subject was mentioned in one context which it was suggested that they provide a case on immunity of state defendants. Will was the case cited, and the 11th Amendment.

Since summary Judgment was granted on affirmative defenses and no transcript was made, no good faith defense was presented.

According to document 22 which allowed or required discovery to be completed, in which it was incomplete and the immunity defense claimed is yet to be determined.

Discovery was to be completed within four months. In this case the relevant and important issues of the state of the law & the foundation upon which it stands would be seriously compromised having no clear guide, and wouid promote uncertainty on a clea view of the state of the law and how it is applied leading to a double standard

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COUNSEL

SHERMAN L. SHAW Pro Se, for myself as, the Plaintiff- Appellant, Kansas city, Missouri 64109.

OPINION

SEYMOUR, Circuit Judge:

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a);... 10th Cir R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant Sherman L. Shaw brought a pro se civil rights action against defendants Frank W. Masters, David W. Robinson & Gene Author Budig, John C. Mcfadden, & Fred Allenbrand claiming they deprived him of ..

his constitutional rights in violation of 42 U.S.C.A. ## 42 U.S.C.A. 1983 and 1985. The district court granted defendents' motion for summary judgment... Rec., vol. II, doc. 38._____defendant then filed a motion to amend the judgment. Rec., vol. II, doc. 40. The district court treated Mr. Shaw's motion for reconsideration and overruled it for lack of merit. Rec., vol. II___ doc 50. We affirm.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata-collateral estoppel. The court generally disfavors citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General order filed November 22, 1993.

Mr. Shaw was transported to the University of Kansas Medical Center (KUMC) in November 1989 to receive treatment___ for severe burns he sustained as the result a fire. While at KUMC, Mr. Shaw underwent Surgery and skin grafts on his legs and thighs. He alleges that on December 12, 1989, while in surgery at KUMC, defendants or their agents surreptitiously implanted an electronic surveillance device in his thigh for the purpose of monitoring__ his conversations and movements. he also allegesthat:defendant Allenbrand,_____the Sheriff of johnson county, Kansas ____has used the bugging device in his thigh to monitor him, and has sent heliocopters & agents into Kansas City, Missouri,_____to pursue and harass him.

In its memorandum and order, the district court considered both the facts of

this case and the applicable law and granted defendants' request for summary judgment. We affirm substantially on the basis of the district court's decision. in addition we review the district court's denial of Mr. Shaw's motion to amend for abuse, of discretion. See Ketchum v. Cruz, 961 F. 2d 916, 920 (10th Cir. 1992),

The district court specifically.. moted that, after reviewing Mr. Shaw's motion, "it articulates nothing warranting reconsideration of the court's reconsideration of the court's previous Memorandum and Order." Rec., supp. vol. I, doc. 50 at 1. Because we find no abuse of discretion ... we affirm.

Finnaly, in an apparent attempt to continue this suit despite the district court's decision below, Mr. Shaw has filed before this court additional pro

se motions seeking to drop defendant Allenbrand from the suit and to join Robert Stephan, the Attorney General for the state of Kansas, as well as four individual members of the Kansas Surgery Association, and the insurance carrier of the Kansas Surgery Association. Mr. Shaw had ample opportunity to bring such motions before the district court. Indeed, in his motion to amend, Mr. Shaw requested the substitution of certain parties, but the district court overruled Mr. Shaw's motion as meritless. It is improper to add parties on appeal and Mr. Shaw's motion is therefore denied.

The decision below is AFFIRMED.

Entered for the Court

Stephanie K. Seymour
Chief Judge